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Public Prosecutor v Mughilesvaran a/l Jaya Chandran

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HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO JA-45B-4–01 OF 2018
SHAHNAZ SULAIMAN JC
11 AUGUST 2021

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Criminal Law — Murder — Circumstantial evidence — Accused charged with murder under s 302 of Penal Code — Whether death was result of injuries sustained by deceased — Whether injuries of deceased caused or result of act of accused — Whether prosecution established prima facie case against accused — Penal Code s 302

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The accused was charged under s 302 of the Penal Code for the offence of murder. The deceased went missing after dropping off her daughter ('SP14') at her work place using her husband's ('SP6') car ('the car'). Eight days later the deceased was found dead in the same car at Taman Sentul, Kulai. Both SP6 and

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SP14 stated that the accused and the deceased knew each other. They also stated that the accused had previously gone to SP6's house to inform SP6 that the accused desired the deceased. The accused had gone to a BHP petrol station in Taman Tropika on 2 June 2017. The cashier ('SP8') who worked at the BHP petrol station identified the accused as the accused had entered into the BHP

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Mart. The CCTV recording at the BHP petrol station showed the accused exiting the car and then into the car again. The car subsequently left the BHP petrol station. The pathologist ('SP13') who conducted the post mortem stated that there were multiple stab wounds on the deceased's chest and abdomen with one stab wound penetrating the heart being fatal. These injuries were in

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keeping patterns due to a sharp object such as a knife or weapons of a similar pattern. There was also injury that likely happened during the commotion, struggle or defence. The issue for consideration was whether the prosecution had established a prima facie case against the accused.

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Held, acquitting and discharging the accused:

(1) The deceased was identified by her husband. According to SP13, the deceased was dead for at least 48 hours prior to the post mortem. The fact that the deceased was dead was accepted and not disputed. As such the prosecution had proven the first ingredient for the offence of murder. The

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cause of death was stab wound to the heart. Having regard to the evidence of SP13 and the post mortem report, it was satisfied that the injuries sustained by the deceased resulted in the death of the deceased. Therefore the second ingredient had been fulfilled by the prosecution (see paras 19, 21–22 & 27–28).

(2) There were inconsistency between the time SP8 said she saw the accused in the BHP Mart and the time in the CCTV recordings. Based on the CCTV recording the time the accused was in BHP Mart, SP8 had not arrived for work at the BHP petrol station. Moreover, SP8 was not seen in the CCTV recording footage. Thus, the identification of the accused by SP8 should be considered cautiously. The accused informed the police that he had thrown away the sim card and the weapon in to the monsoon drain. The accused did not lead the police to the monsoon drain. Hence, s 27 of the Evidence Act 1950 was not applicable to the facts of this case. In relation to DNA evidence, there was no DNA evidence of the accused which linked the accused to the murder of the deceased. As the deceased was stabbed several times, it could reasonably be expected that the perpetrator of the crime would have some blood stains on his clothing. The accused was never seen with any blood stains on his clothing. In the event a struggle or commotion or defence had occurred, it could reasonably be expected that some blood stains of the deceased would have been found on the clothing of the perpetrator. Based on the CCTV recording no blood stains were found on the clothing of the accused when he went back to work. In addition, it would not be possible for the offence to be committed during the time frame as stated in the charge; between about 7am on 2 June 2017 and 5.30pm on 10 June 2017 because the car was seen leaving the place of incident stated in the charge on 2 June 2017 at 12.29pm. The evidence did not substantiate the charge proffered against the accused (see paras 42, 48, 54, 58, 60–61 & 68–69).

(3) The circumstantial evidence was insufficient to come to a conclusion that the accused caused the injuries to the deceased which resulted in the death of the deceased. The evidence was insufficient to glue together the pieces of circumstantial evidence to produce a complete narrative. The evidence did not support the prosecution's contention that the accused had inflicted the injuries on the deceased which resulted in the death of the deceased. Consequentially, the prosecution had failed to prove the third ingredient for the offence (see paras 72–74).

(4) The charge of murder must undoubtedly fail. The prosecution had failed to make out a prima facie case against the accused in respect of the charge of murder punishable under s 302 of the Penal Code (see paras 76–77).

[Bahasa Malaysia summary

Tertuduh didakwa di bawah s 302 Kanun Keseksaan atas kesalahan membunuh. Si mati hilang selepas menghantar anak perempuannya ('SP14') di tempat kerjanya menggunakan kereta suaminya ('SP6'). Lapan hari kemudian, si mati ditemui mati dalam kereta yang sama di Taman Sentul, Kulai. Kedua-dua SP6 dan SP14 menyatakan tertuduh dan si mati mengenali antara satu sama lain. Mereka juga menyatakan bahawa tertuduh sebelum ini pergi ke rumah SP6 untuk memaklumkan SP6 bahawa tertuduh

menginginkan si mati. Tertuduh telah pergi ke stesen minyak BHP di Taman Tropika pada 2 Jun 2017. Juruwang ('SP8') yang bekerja di stesen minyak BHP itu mengenal pasti tertuduh sebagai tertuduh yang telah memasuki BHP Mart. Rakaman CCTV di stesen minyak BHP menunjukkan tertuduh keluar dari kereta dan kemudian masuk ke dalam kereta semula. Kereta itu kemudiannya meninggalkan stesen minyak BHP. Pakar patologi ('SP13') yang menjalankan bedah siasat menyatakan terdapat beberapa kesan tikaman di dada dan perut si mati dengan satu tikaman menembusi jantung yang membawa maut. Kecederaan ini adalah selari dengan bentuk disebabkan oleh objek tajam seperti pisau atau senjata dengan bentuk yang serupa. Terdapat juga kecederaan yang mungkin berlaku semasa pergolakan, pergelutan atau pertahanan. Isu untuk pertimbangan adalah sama ada pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh.

Diputuskan, melepas dan membebaskan tertuduh:

(1) Si mati telah dikenal pasti oleh suaminya. Menurut SP13, si mati telah meninggal dunia sekurang-kurangnya 48 jam sebelum bedah siasat. Hakikat bahawa si mati telah meninggal dunia diterima dan tidak dipertikaikan. Oleh itu pihak pendakwaan telah membuktikan kandungan pertama bagi kesalahan membunuh. Punca kematian adalah luka tikaman di jantung. Mengambil kira keterangan SP13 dan laporan bedah siasat, adalah berpuas hati bahawa kecederaan yang dialami si mati mengakibatkan kematian si mati. Oleh itu kandungan kedua telah dipenuhi oleh pihak pendakwaan (lihat perenggan 19, 21–22 & 27–28).

(2) Terdapat percanggahan antara masa SP8 berkata dia melihat tertuduh di BHP Mart dan masa dalam rakaman CCTV. Berdasarkan rakaman CCTV ketika tertuduh berada di BHP Mart, SP8 belum tiba untuk bekerja di stesen minyak BHP. Tambahan lagi, SP8 tidak kelihatan dalam rakaman rakaman CCTV. Justeru, pengecaman tertuduh oleh SP8 perlu dipertimbangkan secara berhati-hati. Tertuduh memaklumkan kepada polis bahawa dia telah membuang kad sim dan senjata ke dalam longkang monsun. Tertuduh tidak membawa polis ke longkang monsun. Oleh itu, s 27 Akta Keterangan 1950 tidak terpakai kepada fakta kes ini. Berhubung bukti DNA, tiada bukti DNA tertuduh yang mengaitkan tertuduh dengan pembunuhan si mati. Memandangkan si mati ditikam beberapa kali, adalah munasabah boleh dijangka bahawa pelaku jenayah itu akan mempunyai beberapa kesan darah pada pakaiannya. Tertuduh tidak pernah dilihat dengan sebarang kesan darah pada pakaiannya. Sekiranya berlaku pergelutan atau pergolakan atau pertahanan, adalah munasabah boleh dijangkakan bahawa beberapa kesan darah si mati akan ditemui pada pakaian si pelaku. Berdasarkan CCTV tiada kesan darah ditemui pada pakaian tertuduh ketika dia kembali bekerja. Di samping itu, kesalahan itu tidak mungkin dilakukan dalam tempoh masa seperti yang dinyatakan dalam pertuduhan; antara kira-kira jam 7 pagi 2 Jun

2017 dan 5.30 petang 10 Jun 2017 kerana kereta berkenaan dilihat meninggalkan tempat kejadian yang dinyatakan dalam pertuduhan pada 2 Jun 2017 jam 12.29 tengah hari. Bukti itu tidak menyokong pertuduhan yang dikemukakan terhadap tertuduh (lihat perenggan 42, 48, 54, 58, 60–61 & 68–69).

(3) Keterangan mengikut keadaan tidak mencukupi untuk membuat kesimpulan bahawa tertuduh menyebabkan kecederaan kepada si mati yang mengakibatkan kematian si mati. Bukti itu tidak mencukupi untuk menyatukan kepingan keterangan mengikut keadaan untuk menghasilkan naratif yang lengkap. Keterangan tidak menyokong dakwaan pihak pendakwaan bahawa tertuduh telah mendatangkan kecederaan ke atas si mati yang mengakibatkan kematian si mati. Akibatnya, pihak pendakwaan gagal membuktikan kandungan ketiga bagi kesalahan itu (lihat perenggan 72–74).

(4) Pertuduhan membunuh harus gagal. Pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh berhubung pertuduhan membunuh yang boleh dihukum di bawah s 302 Kanun Keseksaan (lihat perenggan 76–77).]

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Idris v PP [1960] 1 MLJ 296, CA (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406; [1999] 1 CLJ 410, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Ong Lai Kim v PP and other appeals [1991] 3 MLJ 111, HC (refd)
Public Prosecution v Abdul Rehman Abdul Hameed [2016] MLJU 970; [2017] 1 CLJ 317, CA (refd)
Prakash Chand vs State (Delhi Administration) 1979 AIR 400, SC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497, CA (refd)
Yii Soon Ho v PP [2014] 5 MLJ 547; [2014] 1 LNS 386, CA (refd)

Legislation referred to

Criminal Procedure Code s 180, 180(2)
Evidence Act 1950 ss 9, 27
Penal Code s 302

Nor Azizah bt Muhammad (Deputy Public Prosecutor, Johor State Legal Advisor's Office) for the plaintiff.
Shaik Saleem BSM Daud (Shaik Adam & Co) for the defendant.

Shahnaz Sulaiman JC:

INTRODUCTION

[1] A woman who is a wife and mother goes missing. She is found dead eight days later in her husband's car. The accused is someone the deceased knew from work. This is the essence of this case. This is the grounds of this court's decision to acquit and discharge the accused without calling for his defence.

THE CHARGE

[2] The charge proffered against the accused read as follows:

> Bahawa kamu diantara 2 Jun 2017 jam lebih kurang 7.00 pagi hingga 10 Jun 2017 jam lebih kurang 5.30 petang bertempat di tempat letak kenderaan hadapan stesen minyak BHP Taman Tropika, Kelapa Sawit di dalam daerah Kulai di dalam Negeri Johor Darul Takzim telah membunuh Suriana binti Sigara (No. KPT: 770723-13-5074), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.
>
> Hukuman: Gantung sampai mati.

THE PROSECUTION NARRATIVE

[3] For this trial, the prosecution case was founded on the ensuing facts. On 10 June 2017 at approximately 2pm, one Hamdan bin Jais (SP6) was at a lorry workshop when he received a telephone call from his brother in law, Mohd Razif bin Yunus (SP5) informing SP6 that his car was found at Lorong 6, Taman Sentul, Kulai. SP6 made his way to Lorong 6, Taman Sentul, Kulai. When SP6 arrived at Lorong 6, Taman Sentul, Kulai, SP6 found that the car was indeed his car. SP6 proceeded to open the driver's door of the car. SP6 found the body of his wife, Suriana bt Sigara ('the deceased') slumped over on the front passenger seat. SP6 ensued to contact the police.

[4] Prior to the recovery of the body of the deceased, the prosecution case unfolds that on 2 June 2017 at about 9.30am, the deceased had dropped off her daughter, Nornazatul Nabilah bt Hamdan (SP14) at her work place using SP6's car. As it was the fasting month, SP14 expected her mother, the deceased to send food to her for the breaking of fast. However, the deceased did not turn up to send food for the breaking of fast to SP14.

[5] Consequently, SP14 and SP6 looked for the deceased but failed to find her. It was only on 10 June 2017, some eight days later that the deceased was found in Taman Sentul.

[6] The testimony of both SP6 and SP14 stated that the accused and the

deceased knew each other. The testimony also stated that the accused had previously gone to SP6's house to inform SP6 that the accused desired the deceased.

[7] The prosecution case further disclosed that the accused had gone to a BHP petrol station in Taman Tropika on 2 June 2017. Nur Hafizah bt Mohd Akil (SP8) who worked at the BHP petrol station identified the accused as the accused had entered into the BHP Mart.

[8] The CCTV recording at the BHP petrol station showed the accused exiting a blue Proton Waja with the registration number JDG 3443 and then into the car again. The car subsequently left the BHP petrol station.

[9] The pathologist, Dr Aznool Haidy bin Hj Ashorori (SP13) conducted the post mortem on the deceased. According to SP13 there were multiple stab wounds on the chest and abdomen with one stab wound penetrating the heart being fatal. It was the pathologist's view that these injuries were in keeping patterns due to a sharp object such as a knife or weapons of a similar pattern. Moreover, SP13 was of the view that the fatal heart injury could have caused direct or immediate fatality due to excessive bleeding and eventually led to the death of the deceased at that moment in time. According to SP13, these injuries are not consistent with patterns due to self-inflicted injury or accidental.

[10] SP13 stated that there was a superficial incision wound 1.5 x 2cm on the back aspect of the left wrist. This injury, in the view of SP13 likely happened during the commotion, struggle or defence. The post mortem results revealed there were five stab wounds with average measuring 1.5 x 0.7cm to 4 x 1.5cm on the front outer aspect of the right lower chest wall and abdomen. One stab wound severed the ninth and tenth outer right ribcage cut fracture and severed the diaphragm and ascending colon. SP13 was of the view that these injuries were in keeping with patterns with that due to sharp objects such as a knife or other weapons with similar pattern. According to SP13, these injuries were least likely to have caused direct fatality. Nonetheless, this injuries could have hasten and contributed to the fatality event.

[11] According to SP13, the findings were consistent with that death due to stab wound to the heart. In his view, the patterns were in keeping with homicide. The cause of death according to SP13 was stab wound to the heart. SP13 produced a post mortem report (exh P43).

A DUTY OF COURT AT THE END OF PROSECUTION CASE

[12] The duty of the court at the end of the prosecution case is provided in s 180 of the Criminal Procedure Code. The court has to decide if the prosecution has established a prima facie case. For ease of reference, s 180 of the
B Criminal Procedure Code is reproduced below:

> Section 180 Procedure after conclusion of case for prosecution.
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the
C accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to
D enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would
E warrant a conviction.'

[13] What is a prima facie case? To answer this question it is perhaps best to consider authorities which have elucidated what consists of a prima facie case. In the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2
F MLJ 1; [1999] 2 AMR 2017 the phrase 'prima facie' was described as follows:

> A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) ... thus, *a prima facie case as prescribed by the new s 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.*
G (Emphasis added.)

[14] The Court of Appeal in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 held:

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> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. *He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.* (Emphasis added.)
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[15] *Mallal's Criminal Procedure* (8th Ed) at p 426 states the following:

> *Duty is placed upon a judge pursuant to section 180 of the CPC to decide whether the*

prosecution has established a prima facie case against the accused at the end of the prosecution's case. In doing so, the judge is required to factor all evidence furnished by the prosecution to a maximum evaluation and is, during this process, required to ask a hypothetical question: 'If I decide to call upon the accused to enter on his defence and he elects to remain silent, am I prepared to convict him on totality of the evidence contained in the prosecution's case?' If this question is answered in the negative, the accused would be entitled to an acquittal as the prosecution has failed to establish a prima facie case.

No provision stipulates that a judge is required to provide grounds prior to calling for the defence to enter its case.

It is noteworthy that a maximum evaluation of the evidence ought to be done at the end of the prosecution's case and before the court decides whether the prosecution has established a prima facie case against the accused. This exercise cannot be postponed to the end of the trial. (Emphasis added.)

[16] Hence, a summary of the authorities quoted would confirm that in determining whether the prosecution has proven a prima facie case against the accused, the court has a duty to exercise maximum evaluation of the evidence of all their witnesses. This exercise involves subjecting all the evidence of the prosecution witnesses to stringent critical analysis in order to determine whether a prima facie case has been made out by the prosecution to justify a court in calling for the accused to enter his defence.

[17] Bearing these principles in mind, this now consider whether the prosecution has established a prima facie case against the first accused and second accused.

EXAMINATION OF THE PROSECUTION CASE

[18] To determine whether the prosecution had proven a prima facie case against the first accused and second accused, the necessary ingredients for the charge of murder must be proven. In the Court of Appeal case of *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 the court stated that the ingredients for the offence of murder are:

(a) that the deceased is dead;

(b) that the death was a result of injuries sustained by the deceased;

(c) that the injuries of the deceased were caused or result of the act of the accused;

(d) that in inflicting the injuries upon the deceased, the accused either:

  (i) caused them with the intention of causing death; or

  (ii) caused them with the intention of causing such bodily injuries as the appellant knew to be likely to cause the death; or

(iii) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death.

The deceased is dead

[19] The body of the deceased, Suriana bt Sigara was identified by her husband Hamdan bin Jais (SP6).

[20] On 11 June 2017 at 2.45pm, the pathologist Dr Aznool Haidy bin Hj Ashorori (SP13) conducted a post mortem was on the deceased, Suriana bt Sigara. The post mortem report (exh P43) did not state the time of death. In his evidence, SP13 stated that an entomology analysis was conducted to determine the approximate time of death. The maggots found from the body of the deceased were sent to the Institute of Medical Research for the entomology analysis. The Institute of Medical Research's report was marked exh P42.

[21] According to SP13, based on the anatomy and the post mortem conducted, the body show signs of decaying (*pereputan*) which indicated the deceased was dead for at least 48 hours prior to the post mortem.

[22] The fact that the deceased is dead is accepted and not disputed. As such this court finds the prosecution has proven the first ingredient for the offence of murder.

That the death was a result of injuries sustained by the deceased

[23] SP13 is the pathologist who performed the post mortem on the deceased. SP13 is the pathologist attached to the Jabatan Perubatan Forensik Hospital Sultanah Aminah, Johor Bahru. SP13 conducted the post mortem on the deceased on 11 June 2017.

[24] SP13 gave evidence on the marks of injuries sustained by the deceased. According to SP13, there were multiple stab wounds on the chest and abdomen with one stab wound penetrating the heart being fatal. SP13 was of the view that these injuries were in keeping patterns due to a sharp object such as a knife or weapons of a similar pattern. SP13 was of the view that the fatal heart injury could have caused direct or immediate fatality due to excessive bleeding and eventually led to the death of the deceased at that moment in time. These injuries according to SP13, were not consistent with patterns due to self-inflicted injury or accidental.

[25] SP13 stated that there was a superficial incision wound 1.5 x 2cm on the back aspect of the left wrist. This injury, in the view of SP13 likely happened during a commotion, struggle or defence.

[26] The post mortem further revealed there were five stab wounds with average measuring 1.5 x 0.7cm to 4 x 1.5cm on the front outer aspect of the right lower chest wall and abdomen. One stab wound severed the ninth and tenth outer right ribcage cut fracture and severed the diaphragm and ascending colon. SP13 was of the opinion that these injuries were in keeping with patterns with that due to sharp objects such as a knife or other weapons with similar pattern. These injuries, according to SP13 were least likely to have caused direct fatality. Nonetheless, this injuries could have hasten and contributed to the fatality event.

[27] According to SP13, the findings were consistent with that death due to stab wound to the heart. In his view, the patterns were in keeping with homicide. The cause of death according to SP13 was stab wound to the heart. The cause of death was stated in the exh P43, the post mortem report.

[28] Having regard to the evidence of SP13 the pathologist and exh P43, this court is satisfied that the injuries sustained by the deceased resulted in the death of the deceased. This court therefore finds that the second ingredient has been fulfilled by the prosecution.

That the injuries of the deceased were caused or result of the act of the accused person

[29] The third ingredient the prosecution is required to establish is that the injuries of the deceased were caused or result of the act of the accused. To establish this ingredient, the prosecution relied on circumstantial evidence.

[30] Pertaining to the finding of guilt, direct evidence is not the only source from which a finding of guilt can be made. The court may rely on circumstantial evidence to make a finding of guilt. This means that even in the absence of direct evidence, the prosecution may secure a conviction through circumstantial evidence.

[31] Case law has expounded in what circumstances circumstantial evidence may be relied on to make a finding of guilt. In *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 the court held as follows:

> [116] The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt. *Conviction can be secured based on circumstantial evidence provided that:*

(a) *the circumstances from which the conclusion of guilt is to be drawn has been established;*

(b) *the facts so established is consistent with the hypothesis of the guilt; and*

(c) *circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence* (See *Magendran Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, *Mazlan Othman v Public Prosecutor* [2013] 1 CLJ 750; [2013] 1 AMR 615; *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22)

[117] It is worth nothing that the court had this to say in *Public Prosecutor v Letchumanan Krishnan* [2008] 3 MLJ 290; [2007] 1 LNS 409:

> [22] *It is axiomatic under our case-law, and we cite the principle repeatedly, that circumstantial evidence alone may be sufficient to support a conviction for murder since the law makes no distinction between circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis that that of guilt of the accused*. (See eg, *Kartar Singh & Anor v R* [1952] 2 MLJ 85; [1952] 1 LNS 43; *Idris v Public Prosecutor* [1960] 1 MLJ 296. *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Karam Singh v Public Prosecutor* [1967] 1 LNS 65; [1967] 2 MLJ 25; *Chong Kim Siong v Public Prosecutor* [1967] 1 MLJ 36; [1967] 1 LNS 18; *Public Prosecutor v Hanif Basree Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33 and *Juraimi bin Jussin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383)

[118] Faizal Ali J when delivering the judgment of the Supreme Court in *Ram Avtar v The State (Delhi Administration)* AIR 1985 SC 1692, had occasion to state:

> At the very outset we might mention that circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. *In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*

[119] The above cases have clearly laid down certain guidelines, whereupon *in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden*. Crimes are usually committed in secret and under condition where concealment is highly probable. *If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible*. In this case not only was the heinous crime committed at a secluded place but the deceased's body was blasted beyond recognition. Only fragments of bones were found. (Emphasis added.)

[32] Also relating to circumstantial evidence, Thomson CJ in the case of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307, held:

> It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is the rope strong enough to hang the prisoner?

[33] In *Yii Soon Ho v Public Prosecutor* [2014] 5 MLJ 547; [2014] 1 LNS 386, His Lordship Varghese George JCA was of the view that the effect of all these cases was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime.

[34] In this case before this court, the question therefore is whether the circumstantial evidence led to the irresistible conclusion that it was the accused who committed the crime. To answer this question, this court will carefully consider the evidence before this court.

[35] The evidence before this court demonstrates that SP14, the deceased's daughter was the last person to see the deceased on 2 June 2017 as the deceased had dropped off SP14 at her work place using the blue coloured Proton Waja belonging to SP6.

[36] On 10 June 2017, SP6 the deceased's husband was informed of the discovery of his blue coloured Proton Waja at Lorong 6, Taman Sentul. SP6 opened the driver's door and found the body of the deceased.

[37] The prosecution case further relies on CCTV footage at the BHP petrol station which showed the accused exiting the blue coloured Proton Waja the deceased used to drop SP14 off at work.

[38] Puan Nor Hafizah bt Mohd Akil (SP8) worked as a cashier at the BHP petrol station. According to SP8, on 2 June 2017, she had noticed the accused in the BHP Mart as the accused took some time before he took two drinks to the cashier. SP8 informed the court that she did not attend to the accused.

[39] The evidence from SP8 is that she worked from 2pm to 10pm on 2 June 2017. She informed the court that she had arrived earlier at approximately 1.50pm on the said day. SP8 stated that she had noticed the accused as the accused took some time to decide which drink to purchase before the accused took the drink to the cashier. SP8, however, did not attend to the accused at the cashier.

[40] Encik Ng Xi Hao (SP10) is the owner of the BHP petrol station. SP10 gave the police the CCTV recording footage at the BHP station on 2 June 2017. The evidence of SP10 and the CCTV footage from the BHP petrol station showed that the accused had entered into the BHP Mart at 12.05pm. At 12.07.31pm, the accused went out of the BHP Mart.

[41] For ease of understanding, the notes of proceedings relating to the CCTV during SP10's testimony is reproduced below:

> S: Ini betul ya rakaman CCTV yang Mr Ng rakam?
>
> J: Ya
>
> S: Pohon untuk pergi ke rakaman seterusnya. Di mana ni?
>
> J: Ini tempat pam angin.
>
> S: Ini kawasan dari pam angin?
>
> J: Kamera berbeza tapi tempat parking yang sama. Camera 03.
>
> S: Saya pohon lihat rakaman seterusnya menunjukkan rakaman pada kamera 04, paparan menunjukkan pada 2/6/2017 10.39.28 pagi. Yang Arif kereta tersebut bergerak pada 11.38.09 pagi kereta biru bergerak. Kamera 4 12.02.41 tengahari pada waktu 12.03.08 pintu sebelah pemandu dibuka dan tutup balik pada 12.03.11. Pada waktu 12.05.19 seorang lelaki keluar dari kereta pintu belah depan penumpang. *Pergi ke motor 12.05 dan seterusnya masuk ke kedai BHP. Lelaki sama keluar 12.07.31 noon.*
>
> 12.08.14 lelaki tersebut ke bahagian pemandu dan kembali kepada bahagian penumpang 12.08.26 dan ke motorsikal 12.08.47. Dan kemudian pergi ke arah kereta 12.09.03. *Pada 12.09.37 balik ke motosikal, dan kemudian tinggalkan tempat tersebut dengan motosikal 12.09.57.* (Emphasis added.)

[42] The evidence of the CCTV showed the accused in the BHP Mart at 12.05noon. He had left the BHP petrol station on his motorcycle at 12.09noon. SP8 gave evidence that she had seen the accused in BHP Mart when she was at work. According to SP8, her working hours were 2pm to 10pm. She said she had arrived at work 1.50pm. However, evidence of SP10 and the CCTV recording footage showed that the accused was at BHP Mart approximately 12.05noon onwards. This court finds that there are discrepancies in the evidence of SP8 and SP10. There were inconsistency between the time SP8 said she saw the accused in the BHP Mart and the time in the CCTV recordings. These contradictions relate to the time the accused was allegedly in the BHP Mart. This raises the question as to whether SP8 had seen the accused in BHP Mart. This court finds based on the CCTV recording the time the accused was in BHP Mart, SP8 had not arrived for work at the BHP petrol station. Moreover, this court found SP8 was not seen in the CCTV recording footage.

[43] This therefore raises the question whether SP8 had actually seen the accused at BHP Mart, particularly as there is inconsistencies in the timing and because SP8 herself was not seen in any of the CCTV footage at the BHP Mart.

[44] In her evidence, SP8 stated that she had identified the accused in an identification parade. When questioned by learned counsel for the accused if she had been seen the accused prior to the identification parade, SP8 gave evidence that the police had shown her the CCTV recording footage prior to identification parade where she identified the accused.

[45] What is the position of the law pertaining to identification parades? There is no written law regarding the procedure for identification parade, although evidence of identification parade admissible under s 9 of the Evidence Act 1950.

[46] In *Ong Lai Kim v Public Prosecutor and other appeals* [1991] 3 MLJ 111 at p 114 the court held that:

> There is no specific provision in our Criminal Procedure Code (FMS Cap 6) or in the Evidence Act 1950 regarding the procedure for identification parades. Reference was made in the old s 113(iii) of the CPC to a statement made in the course of an identification parade. But the whole of s 113 was substituted by a new s 113 vide Act A324 which came into effect on 10 January 1976. The present s 113 makes no reference to identification parade.'

[47] In the case of *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406; [1999] 1 CLJ 410 the court held:

> The Law
>
> Pre-trial identification of suspected offenders are complemented by judicial guidelines concerning the appraisal of identification evidence at the trial itself (see *Criminal Evidence* (3rd Ed) by Andrews & Hirst at p 336). These guidelines were enunciated by the Court of Appeal in Turnbull as a result of criticism of the existing law under which no specific duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence (see *R v Long* [1973] 57 Cr App R 871). The Turnbull guidelines have been accepted in Canada (see *Mezzo v R* [1986] 4 WWR 577); in Australia (see *Kelleher v R* [1974] 131 CLR 534); and in Malaysia (see *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91; [1981] 1 CLJ 129 ; *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 CLJ 10; [1983] 2 MLJ 232; *Yau Heng Seng v Public Prosecutor* [1985] 2 MLJ 335; *Arumugam Muthusamy v Public Prosecutor* [1998] 3 MLJ 73; [1998] 3 CLJ 597). These guidelines which appear in the judgment of Lord Widgery CJ in Turnbull deal with four issues. In elaborating on these issues I can do no better than reproduce the work of Andrews & Hirst from pp 338–339 where the learned authors have admirably re-arranged certain paragraphs of the judgment to explain them.
>
> ... The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have

A the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? *Had the witness ever seen the accused before*? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there
B any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first
C given. In all cases if the accused asks to be given particulars of such description, the prosecution should supply them. (Emphasis added.)

[48] In this case, the witness SP8 was shown the CCTV recording of the accused at the BHP Mart by the police. This was done prior to SP8 identifying
D the accused in the identification parade. It is the view of this court that it is therefore not surprising if SP8 could have identified the accused during the identification parade. This is because she had been shown the CCTV recording of the accused in the BHP Mart prior to the identification parade. Thus, this court finds the identification of the accused should be considered cautiously,
E particularly as SP8 had seen the CCTV recording prior to identify the accused.

[49] SP9 Insp Cassidy Anak Banta informed the court that the accused had given information that the weapon used and the sim card had been disposed of in a monsoon drain in Indahpura Kulai Johor. This information was reduced in
F Kulai police report number Kulai/008331/17 which was marked exh P38. In exh P38, SP9 stated that '... penama Mughielesvaran a/l Jaya Chandran KPT 981112015639 telah memberitahu kami perkara berikut — senjata yang digunakan dan sim kad telah saya buang dilongkang besar Indahpura Kulai
G Johor ...'. In the course of SP9's oral evidence, SP9 informed the court the information received from the accused was done on a voluntary basis.

[50] Based on this information from the accused, the police conducted a search of the monsoon drain in Indahpura Kulai Johor. The search was not
H successful as no weapon was recovered from the monsoon drain. The accused did not lead the police to the monsoon drain. In such a circumstance, would s 27 of the Evidence Act 1950 be applicable?

[51] Section 27 of the Evidence Act 1950 states as follows:

I Section 27 How much of information received from accused may be proved.

(1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[52] In *Prakash Chand vs State (Delhi Administration)* 1979 AIR 400 the Supreme Court of India stated:

> For example, the evidence of the circumstances, simpliciter, *that an accused person led a police officer and pointed out the place where the stolen articles or weapons which have been used in the commission of the offence were found hidden*, would be admissible as conduct, under section 8 of the Evidence Act, irrespective of whether any information contemporaneously with or antecedent to any such conduct falls within the purview of section 27 of the Evidence Act. (Emphasis added.)

[53] Sarkar's Law of Evidence Malaysia edition at p 1100 states that:

> This section appears to be grounded on the aspect that if a fact is indeed discovered as a result of information given, some assurance is afforded thereby that the information was true, and consequently may be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate [see Sir John Beaumont in *Pulukuri Kottaya v Emperor* [1947] AIR PC 62]. In *Public Prosecutor v Prabhagaran a/l Kegobalu* [2017] MLJU 1392, the whole rationale for the admission of information leading to the discovery under s 27 is that the discovery of the items affords a guarantee that the information given is true and can therefore be safely admitted. See *Public Prosecutor v Er Ah Kiat* [1996] 1 MLJ 9 and *Public Prosecutor v Toh Ah Keat* [1977] 2 MLJ 87. Also see *Sulaiman bin Hamat v Public Prosecutor* [2012] 4 MLJ 514 (CA Putrajaya), where the court held that in the scope encompassed by s 27, the fact discovered from the information so provided by itself proves the reliability of the information provided.

[54] In this case, the accused informed the police that he had thrown away the sim card and the weapon in to the monsoon drain. The accused did not lead the police to the monsoon drain. Hence, applying the facts of this case to s 27 of the Evidence Act 1950, this court finds that s 27 of the Evidence Act 1950 is not applicable to the facts of this case.

[55] In relation to DNA evidence, the evidence of SP16 Wan Nur Zawani bt Wan Mohd Samsudin the chemist is that there is no DNA evidence of the accused that could link the accused to the murder of the deceased.

[56] SP16's findings were reduced in the chemist report dated 8 August 2017 (exh P53). In her report, SP16 stated that she found no bloodstain on the accused's t-shirt and no bloodstain on the accused's jeans. This evidence supports the CCTV recording at the accused's work place which showed the accused coming back to work after lunch with his clothing free of blood stains.

[57] In the case of *Public Prosecution v Abdul Rehman Abdul Hameed* [2016] MLJU 970; [2017] 1 CLJ 317, the Court of Appeal held:

> Thirdly, and importantly as submitted by the learned Deputy Public Prosecutor, it

A was obvious from the grounds of judgment that *the learned trial judge had failed to give sufficient consideration to the evidence that the respondent's DNA was detected in the blood stains found on the clothing worn by the deceased*, from the fingernail scrapings of the deceased, as well as found on other articles from the room where the deceased body was found. *This was the most relevant and crucial evidence that linked* B *the respondent to the offence he was charged with*. (Emphasis added.)

[58] In this instant case, there was no DNA evidence of the accused which linked the accused to the murder of the deceased. Hence, there was no DNA evidence to link the accused to the murder of the deceased.

C

[59] Pertaining to the accused's movement on 2 June 2017, the evidence before this court reveal that the accused had gone to work that morning. This was evident from the CCTV recording footage which was retrieved by Insp Siti Safawati bt Mustafar (SP7). The CCTV recording at the accused's workplace D which is a workshop showed he accused had left the workshop at about 12. The CCTV footage further shows the accused went back to work at about 2pm. From the images of the CCTV footage, the accused was wearing a white t-shirt. He is seen wearing the same t-shirt in the CCTV footage at the BHP petrol E station on the same day. SP17 agreed that the accused was wearing the same t-shirt at the BHP petrol station and at his place of work. There were no blood stains on his attire when he went back to work after meeting the deceased. The chemist report exh P 53 confirmed there were no blood stains on the accused's clothing.

F

[60] The postmortem report revealed that the deceased had been stabbed several times. As the deceased was stabbed several times, it could reasonably be expected that the perpetrator of the crime would have some blood stains on his clothing. The accused was never seen with any blood stains on his clothing. G This raised the questions as to whether the accused was the actual perpetrator of the murder.

[61] The pathologist, SP13 gave evidence there was a superficial incision wound of about 1.5 x 0.2 cm on the back aspect of the left wrist of the deceased. H This, in the view of SP13 was most likely to happen during the commotion, struggle or defence. SP13's evidence stated that based on these injuries the deceased sustained, there was a struggle or defence. In the event a struggle or commotion or defence had occurred, it could reasonably be expected that some I blood stains of the deceased would have been found on the clothing of the perpetrator. Based on the CCTV recording of the accused at his work place after his lunch break on the day of the incident, no blood stains were found on the clothing of the accused when he went back to work.

[62] Another finding of this court relates to the drinks found in the SP6's car. The evidence from the CCTV footage at the BHP Mart showed the accused buying two canned drinks. The drinks found in the car when the body of the deceased was recovered was not two canned drinks but bottles of mineral water. This was confirmed by the investigating officer SP17.

[63] The prosecution case suggested that the relationship between the accused and the deceased was cause for the accused to murder the deceased. The learned counsel for the accused raised the issue of intimate videos of the deceased with other men on Facebook. SP6 in cross examination informed the court that he suspected the accused had uploaded the vidoes on facebook but did not know for certain if the accused uploaded the videos. According to SP6, he had questioned the deceased about the videos. The deceased denied it was her in the videos.

[64] There was no investigation by the police into the videos uploaded on facebook which were of a sexual nature. It is the view of this court that in the event the police had conducted an investigation on the videos, it would be possible that the police would have determined if there were other men known to the deceased who might have inflicted the injuries to the deceased.

[65] The post mortem report (exh P43) did not state the time of death. In his evidence, SP13 stated that an entomology analysis was conducted to determine the approximate time of death. The maggots found from the body of the deceased were sent to the Institute of Medical Research for the entomology analysis. The Institute of Medical Research's report was marked exh P42. According to SP13, based on the anatomy and the post mortem conducted, the body show signs of decomposing (pereputan) which indicated the deceased was dead for at least 48 hours prior to the post mortem.

[66] The charge against the accused stated the time the offence was committed as between 2 June 2017 at about 7am and 10 June 2017 at about 5.30pm. The post mortem was conducted on 11 June 2017. Based on the evidence of SP13, the time of death was at least 48 hours before the post-mortem would mean that the deceased was dead at the latest by 9 June 2017. Therefore based on the evidence of SP13, this court finds it would not be possible for the offence to be committed in the time frame as stated in the charge 'hingga 10 Jun 2017 lebih kurang 5.30 petang'.

[67] The charge stated the place of incident as 'bertempat di tempat letak kenderaan hadapan stesen minyak BHP Taman Tropika, Kelapa Sawit di dalam daerah Kulai di dalam Negeri Johor Darul Takzim'. This is the parking lot at the BHP Petrol Station where the accused was seen on CCTV entering the BHP Mart. The CCTV evidence before this court demonstrates the blue coloured

Proton Waja with registration number JGD 3443 leaving the BHP Petrol Station parking lot on 2 June 2017 at 12.29.37pm.

[68] The blue Proton Waja bearing registration number JGD 3443 was not seen again at the parking lot of the BHP Petrol station. Yet, the charge read the time of the offence as 'diantara 2 Jun 2017 jam lebih kurang 7 pagi hingga 10 Jun 2017 jam lebih kurang 5.30 petang'. The evidence before this court is that the blue coloured Proton Waja bearing registration number JGD 3443 was only seen on CCTV recording at the parking lot of the BHP Petrol station on 2 June 2017. The blue Proton Waja bearing registration number HGD 3443 left the BHP petrol station at 12.29.37pm. Hence, it is the view of this court that it would not be possible for the offence to be committed during the time frame as stated in the charge; between about 7am on 2 June 2017 and 5.30pm on 10 June 2017 at the place stated in the charge. This is because the blue coloured Proton Waja was seen leaving the place of inciden stated in the charge on 2 June 2017 at 12.29.37pm.

[69] Founded on this, this court finds that the evidence before this court did not substantiate the charge proffered against the accused.

[70] For this case, the prosecution was relying on circumstantial evidence. The authorities quoted above have established in absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. It would therefore be possible for the prosecution to secure a conviction based on circumstantial evidence. Nonetheless, the conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime.

[71] In the case of *Idris v Public Prosecutor* [1960] 1 MLJ 296 the court held:

> With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of Belhaven & Stenton Peerage reported in 1875-6 Appeal Cases, p 297:
>
> > *My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.*
>
> *In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion*. If the circumstantial evidence is such as to fall short of that standard, if

it does not satisfy that test, if it leaves gaps then it is of no use at all. (Emphasis added.)

[72] The question that ensues is whether the circumstantial evidence in this case has led to the irresistible conclusion that it was the accused who committed the murder of the deceased. In order to answer this question, this court had carefully considered all the evidence before this court on a maximum evaluation. Grounded on the examination of the evidence before this court as stated in the preceding paragraphs, this court is of the view that the circumstantial evidence before this court in this case is insufficient for this court to come to a conclusion that the accused caused the injuries to the deceased which resulted in the death of the deceased.

[73] The strands of circumstantial evidence in this case left gaps in the prosecution case. The strands of circumstantial evidence could not be woven into a cloth that did not have slits. The evidence, this court found, was insufficient to glue together the pieces of circumstantial evidence to produce a complete narrative.

[74] Hence, this court found the evidence before this court did not support the prosecution contention that the accused had inflicted the injuries on the deceased which resulted in the death of the deceased. Consequentially, this court found the prosecution had failed to prove this third ingredient for the offence.

The bodily injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death

[75] The third ingredient of the offence has not been fulfilled by the prosecution as part of the requirement by the prosecution to establish a prima facie case. Hence, it is the view of this court that it will be futile for this court to proceed to consider whether the fourth ingredient has been proven by the prosecution. This court will not proceed to analyse whether or not the fourth ingredient has been fulfilled by the prosecution.

DECISION

[76] Based on the above findings and for the reasons I have earlier stated, I find that the prosecution has failed to prove that the injuries of the deceased were caused or result of the act of the accused. As this ingredient was not proven by the prosecution against the accused, it follows that the charge of murder must undoubtedly fail.

A [77] Upon a maximum evaluation of the evidence and for the reasons expressed above, I hold that the prosecution has failed to make out a prima facie case against the accused in respect of the charge of murder punishable under s 302 of the Penal Code.

B [78] In accordance with s 180(2) of the Criminal Procedure Code, I acquit and discharge the accused without calling upon him to make his defence.

Accused acquitted and discharged.

C Reported by Nabilah Syahida Abdullah Salleh

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